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October Term, 1989

NORFOLK AND WESTERN RAILWAY COMPANY, ET AL.,
PETITIONERS

v.

AMERICAN TRAIN DISPATCHERS ASSOCIATION, ET AL.

CSX TRANSPORTATION, INC., PETITIONER

v.

BROTHERHOOD OF RAILWAY CARMEN, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether, under 49 U.S.C. 11341(a), a party that has entered into a merger approved by the Interstate Commerce Commission is exempt from the legal obligations imposed by a collective bargaining agreement, to the extent such an exemption is necessary in order to implement the merger.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1027

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 880 F.2d 562.[1] The court of appeals' order of September 29, 1989 (Pet. App. 27a-28a), amending its prior opinion, is unreported. The opinion of the Interstate Commerce Commission in No. 89-1027 (Pet. App. 29a-46a) is unreported; the Commission's opinion in

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[1] References to "Pet. App." are to the appendix to the petition in No. 89-1027.

No. 89-1028 (89-1028 Pet. App. 33a-52a) is reported at 4 I.C.C.2d 641.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 1989. Petitions for rehearing in both cases were denied on September 29, 1989 (Pet. App. 49a-50a). The petitions for a writ of certiorari in both cases were filed on December 28, 1989, and were granted on March 26, 1990. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).[2]

STATUTORY PROVISION INVOLVED

49 U.S.C. 11341(a) provides in pertinent part:

Scope of authority

> The authority of the Interstate Commerce Commission under this subchapter is exclusive. A carrier or corporation participating in or resulting from a transaction approved by or exempted by the Commission under this subchapter may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority. A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction * * *.

[2] Under the Hobbs Administrative Orders Review Act, 28 U.S.C. 2341 *et seq.*, this Court is authorized to review, on a writ of certiorari as provided by 28 U.S.C. 1254(1), "a final judgment of the court of appeals." 28 U.S.C. 2350. Although the court of appeals remanded this case to the Commission for further proceedings, we believe its decision is nonetheless "final" for purposes of Section 2350, and is therefore reviewable by this Court. We have explained our views on this point at greater length in our opening brief (at 29-30) and reply brief (at 13 & n.10) in *Sullivan* v. *Finkelstein*, No. 89-504, copies of which have been furnished to all counsel.

STATEMENT

The Interstate Commerce Commission has broad authority to examine, condition, and approve proposed rail carrier consolidations. In the two cases presented, the Commission approved the merger of rail systems and, as a condition of its approval, imposed certain labor protective requirements, intended to soften the impact of the merger on affected employees. Some years later, the merged carriers sought to carry out the approved consolidation by integrating into a single facility services then being performed at separate outlets. Because the proposed integration entailed adverse impacts for employees, however, the respondent unions invoked their rights under existing collective bargaining agreements and requested negotiations under the Railway Labor Act (RLA), 45 U.S.C. 151 *et seq.*

Reviewing the decision of arbitration committees, the Commission sustained the proposed integrations – thereby precluding enforcement of the conflicting terms of the collective bargaining agreements. The agency relied, in part, on Section 11341(a) of the Interstate Commerce Act, under which parties to an ICC-approved consolidation are exempt "from all other law, including State and municipal law, as necessary to let that person carry out the transaction." 49 U.S.C. 11341(a). The court of appeals reversed the Commission's decision, holding that Section 11341(a) applies only to "positive enactments, not common law rules of liability, as on a contract." Pet. App. 18a. Accordingly, the court ruled, Section 11341(a) does not exempt carriers from their legal obligations under collective

bargaining agreements—including those obligations that may jeopardize implementation of an ICC-approved consolidation.

A. Statutory Framework

Chapter 113 of the Interstate Commerce Act (ICA, or Act), 49 U.S.C. 11031 *et seq.*, vests the Interstate Commerce Commission with exclusive and plenary jurisdiction to examine, condition, and approve rail carrier combinations, including the consolidation of two or more carriers. 49 U.S.C. 11343(a)(1). The statutory provisions grant the Commission broad authority to evaluate the effects of these transactions on interested persons and the public. See 49 U.S.C. 11341-11351 (1982 & Supp. V 1987).

Section 11344(c) provides that upon application of the parties, the Commission may conduct a proceeding and "shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest." 49 U.S.C. 11344(c). That Section identifies specific criteria to guide the Commission's consideration, including "the interest of carrier employees affected by the proposed transaction." 49 U.S.C. 11344(b)(1)(D).[3]

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[3] Section 11344(b)(1) instructs that in situations, as here, involving the merger or control of at least two class I railroads, the Commission shall consider "at least" the following factors (49 U.S.C. 11344(b)(1)):

(A) the effect of the proposed transaction on the adequacy of transportation to the public.

(B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

(C) the total fixed charges that result from the proposed transaction.

(D) the interest of carrier employees affected by the proposed transaction.

Section 11344(c) also provides that the Commission "may impose conditions governing the transaction." 49 U.S.C. 11344(c).

Section 11347 provides that the Commission shall impose conditions to protect the interests of railroad employees who are adversely affected by an approved transaction. 49 U.S.C. 11347 (1982 & Supp. V 1987).[4] Pursuant to that authority, the Commission has formulated standard labor-protective conditions, derived from the Commission's decision in *New York Dock Ry.—Control—Brooklyn Eastern Dist. Terminal*, 360 I.C.C. 60, 84-90, aff'd *sub nom. New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979). The *New York Dock* conditions establish, among other things, procedures to resolve—by negotiation and, failing that, binding arbitration—any labor dispute arising from an ICC-approved railroad consolidation. Accordingly, Section 4 of the *New York Dock* conditions, 360 I.C.C. at 85, requires a "railroad contemplating a transaction which . . . may cause the dismissal or displacement of any employees, or rearrangement of forces [to] give at least ninety . . . days written notice . . ." Pet. App. 3a. Section 2, 360 I.C.C. at 84, provides that "[t]he rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits . . . under applicable laws

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(E) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region.

[4] Among other things, Section 11347 states that "[t]he arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period)." 49 U.S.C. 11347 (1982 & Supp. V 1987).

and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements." Pet. App. 3a-4a. These conditions ensure that transactions found to be in the public interest can be consummated without labor strife by providing a "fair arrangement" (49 U.S.C. 11347 (Supp. V 1987)) for displaced employees.[5]

When the Commission has approved a transaction, the statute exempts the participants from legal obstacles that would otherwise bar or impede its implementation. Section 11341(a), the so-called immunity provision, provides that upon ICC approval of a Section 11343 transaction:

> A carrier * * * participating in that approved * * * transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction * * *.

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[5] The conditions devised by the Commission under Section 11347 for approved transactions stand in sharp contrast to the RLA's cumbersome procedures for changing the provisions of a collective agreement. Under the RLA, an attempt to change a collective agreement results in a "major dispute." *Elgin, J. & E. Ry.* v. *Burley*, 325 U.S. 711, 723 (1945), aff'd on reh'g, 327 U.S. 661 (1946). The parties must engage in a protracted procedure to resolve their differences, which includes negotiation, mediation, and conciliation, and must consider voluntary arbitration. See 45 U.S.C. 156, 157. If the parties are unable to reach an agreement, either party may resort to economic self-help such as a lock-out or strike. See generally *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 378-380 (1969).

B. Proceedings Below

1. *No. 89-1027*

a. In March 1982, the ICC approved the application of NWS Enterprises, Inc. (now Norfolk Southern, or NS), a holding company, to acquire control of two rail carriers, petitioners Norfolk and Western Railway Company (N & W) and Southern Railway Company (Southern). See *Norfolk Southern Corp.—Control—Norfolk & W. Ry. and Southern Ry.*, Finance No. 29430 (Sub-No. 1), 366 I.C.C. 173 (1982). In its order approving control, the ICC imposed the standard *New York Dock* labor-protective conditions. Pet. App. 6a. Although the Commission recognized that it was "possible that further displacement [of employees] may arise as additional coordinations occur," it concluded that "the minimum statutory protection of *New York Dock* is appropriate for the protection of applicants' employees affected by this proceeding." 366 I.C.C. at 230-231.

Respondent American Train Dispatchers' Association (the Association) was the bargaining representative of certain N & W employees responsible for "power distribution"—the process by which locomotives are assigned to particular trains and facilities. On September 12, 1986, petitioners informed the Association that they intended to consolidate all power distribution for the combined Norfolk Southern operation by transfering the work performed at the N & W power distribution center in Roanoke, Virginia, to the Southern center in Atlanta, Georgia.[6] The carriers proposed that affected N & W

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[6] Petitioners asserted that as a result of the proposed consolidation, "power distribution functions would be aligned along * * * [a] more efficient east-west division of the combined system," thus permitting "substantial cost savings because fewer locomotives will be needed and

employees would be "given consideration" for employment in new positions as superintendents in Atlanta. Superintendents in Atlanta were considered management, however, and were therefore not covered by any collective bargaining agreement. Pet. App. 6a-7a, 30a-31a.

The Association thereafter sought to negotiate the terms under which the proposed transfer would be implemented. The negotiations foundered, however, over the Association's contentions that (1) the carriers' proposal involved a change in an existing collective agreement and was subject to mandatory bargaining under the RLA; (2) the carriers were required to preserve the right of the transferred employees to representation under the RLA; and (3) the affected employees were entitled to retain their rights, including their seniority rights, under the collective bargaining agreement with N & W. The carriers then asked the National Mediation Board to appoint an arbitrator pursuant to Section 4 of the *New York Dock* conditions. Pet. App. 7a.

The dispute thereafter came before a three-member arbitration committee, which ruled in favor of the carriers on each of the disputed issues. See J.A. 8-32. The committee first found that the proposed consolidation was part of the control transaction approved by the ICC. J.A. 15-16. It noted that when the Commission approved the underlying merger, the agency had expressly anticipated the possibility of "additional coordinations" that would further "the goal of greater efficiencies" J.A. 15. The committee concluded that the proposed transfer of work to Atlanta met that criterion. J.A. 15-16.[7] Relying on prior

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the remaining locomotives can be used more efficiently." Pet. App. 31a-32a.

[7] In particular, the committee observed that during the hearing it had received testimony indicating "that there will be substantial saving

ICC decisions (J.A. 17-19), the committee also held that it had the authority to override—to bar enforcement of—any provision of a collective bargaining agreement or of the Railway Labor Act that impeded implementation of the ICC-approved merger between N & W and Southern. Finally, the committee concluded that the transferred employees could not retain their rights under the collective bargaining agreement. Pet. App. 7a.

The carriers thereafter effected the coordination of work and offered superintendent positions to all nine active and three furloughed N & W employees. Nine of the twelve accepted, two declined, and one retired. There were no displacements of other employees. Pet. App. 33a.

b. The Commission affirmed by a divided vote. Pet. App. 29a-46a. It explained that "[i]t has long been the Commission's view that private collective bargaining agreements and RLA provisions must give way to the Commission-mandated procedures of section 4 [of the *New York Dock* conditions] when parties are unable to agree on changes in working conditions required to implement a transaction authorized by the Commission." *Id.* at 33a. Accordingly, the Commission stated, "the panel correctly found * * * that * * * the compulsory, binding arbitration required by Article I, section 4 of *New York Dock*, took precedence over RLA procedures whether asserted independently or based on existing collective bargaining agreements." *Id.* at 35a.

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to the combined carrier through the planned coordination, both in capital costs since fewer locomotives will be needed and also since operating costs of the remaining locomotives may be reduced through their more efficient utilization throughout the entire system." J.A. 16. See also J.A. 10 (testimony of J.R. Martin, Senior Vice President, Transportation Planning, Southern Railway Company).

The ICC also held that, because the proposed transfer was incident to the merger approved by the Commission, it was "immunized from conflicting laws by section 11341(a)." Pet. App. 35a.[8] The Commission explained that "[t]o the extent that existing working conditions and collective bargaining agreements conflict with a transaction which [the ICC] ha[s] approved, those conditions and agreements must give way to the implementation of the transaction." *Id.* at 36a. "Such a result is essential," the ICC noted, "if transactions approved by [the agency] are not to be subjected to the risk of non-consummation as a result of the inability of the parties to agree on new collective bargaining agreements effecting changes in working conditions necessary to implement those transactions." *Id.* at 34a. Were the law otherwise, the Commission added, there would be "no assurance that the approved transaction will ever be effected." *Ibid.*

Finally, the Commission upheld as appropriate the decision to override the collective bargaining agreement and the RLA provisions. Reviewing the record, the Commission noted that "[i]mposition of the collective bargaining agreement would jeopardize the transaction because the work rules it mandates are inconsistent with the carriers'

[8] The Commission noted that although "[t]he proposed transfer" was "not specifically mentioned in *Norfolk Southern Control*," it was nonetheless "one of the future coordinations and public benefits expected to flow from, and is therefore part of, the control transaction that [the Commission] approved. Indeed, the arbitration panel found that coordination of locomotive power is precisely the type of action that might reasonably be expected to flow from the control transaction." Pet. App. 35a.

underlying purpose of integrating the power distribution function." [9] Pet. App. 37a.[10]

2. *No. 89-1028*

a. On September 23, 1980, the ICC approved a proposal under which CSX Corporation would acquire control of two other holding companies: (1) the Chessie System, Inc., whose principal railroad subsidiaries were the Chesapeake and Ohio Railway Company and the Baltimore and Ohio Railroad Company; and (2) Seaboard Coast Line Industries, Inc., the parent of the Seaboard Coast Line Railroad (later to become petitioner, CSX Transportation, Inc.). See *CSX Corp.—Control—Chessie Sys., Inc., & Seaboard Coast Line Indust., Inc.*, Finance No. 28905 (Sub-No. 1), 363 I.C.C. 521 (1980). As required by Section 11347 of the Act, the Commission imposed a standard set of labor protective conditions, derived from *New York Dock*. Pet. App. 3a-4a; 89-1028 Pet. App. 54a. The Commission recognized that "as the two systems mesh their operations, additional coordinations may occur that could lead to further employee displacements." 363 I.C.C. at 589. Nevertheless, refusing to accede to the unions' request for more favorable protections, the Commission determined that "the standard conditions will adequately protect those employees now identified as affected by the

[9] In denying the Association's earlier application to stay the Committee's arbitration award, the Commission had also noted that "the record shows that N & W and Southern will realize a $26 million capital investment saving and an annual $2 million operating expense saving, exclusive of labor cost savings, from the coordination." J.A. 37.

[10] Commissioner Lamboley dissented. Pet. App. 42a-46a. In his view, the case should have been remanded to the arbitration panel for a determination of whether, and to what extent, the provisions of the collective bargaining agreement could have been accommodated, consistent with the goal of completing the approved transfer.

consolidation as well as those who may be affected in the future, but are not now identified specifically." *Ibid.*

At the time of the consolidation, Chessie operated a heavy freight car repair shop in Raceland, Kentucky, and Seaboard operated a similar shop in Waycross, Georgia. On August 29, 1986, CSX, invoking Section 4 of the *New York Dock* conditions, notified the respondent labor organizations that it intended to close the Waycross shop and to transfer the employees and the work from that shop to the Raceland shop. The transfer was to result in a net decrease in available jobs at the two shops. Pet. App. 4a; 89-1028 Pet. App. 55a.

Relations between CSX and the unions representing its employees were governed at the time by a collective bargaining agreement known as the "Orange Book," negotiated to implement a previously authorized merger. See 89-1028 Pet. App. 54a-55a. The Orange Book provided, among other things, that the carrier would employ each covered employee for the remainder of his working life, and that no covered employee "shall be deprived of employment or placed in a worse position with respect to compensation, rules, working conditions, fringe benefits or rights and privileges pertaining thereto at any time during such employment." Pet. App. 4a. In return for that job protection, the Orange Book gave the carrier the right "to transfer the work of the employees protected [t]hereunder throughout the merged or consolidated [*i.e.*, Seaboard] system * * *." *Ibid.*

Once notified of the proposed transfer of work and employees, respondent Brotherhood of Railway Carmen (the Brotherhood) attempted to negotiate an implementation agreement on behalf of the affected employees. Negotiations foundered, however, due to disagreements about (1) whether the displaced Waycross employees would retain their Orange Book rights; and (2) whether the

proposed transfer would result in a change of working conditions and, if so, whether CSX would be required to comply with the Railway Labor Act before effecting such a change. CSX invoked arbitration under the *New York Dock* conditions, and the matter came before a three-member arbitration panel. Pet. App. 4a-5a.

The arbitration panel concluded that the Orange Book prohibited the proposed transfer of work and employees. 89-1028 Pet. App. 82a-83a. The panel stated, however, that as a "quasi-judicial extension of the ICC" (*id.* at 80a), it had the authority to override any Orange Book or RLA provision that impeded the transfer decision. The panel then held that (1) it would override the Orange Book prohibition on the transfer of work, but not on the transfer of employees, and (2) it would exempt CSX from the RLA insofar as the statute might require the carrier to bargain before unilaterally changing the Orange Book with respect to the transfer. Pet. App. 5a-6a.[11]

b. By a divided vote, the Commission affirmed in part and reversed in part. 89-1028 Pet. App. 33a-52a. The Commission agreed that the arbitrators were "empowered to override collective bargaining rights, such as those in the Orange Book, and RLA rights in formulating the implementing agreement." *Id.* at 43a. But it rejected the panel's refusal to permit the transfer of employees to Raceland. The Commission reasoned that if, as the panel had found, the Orange Book prohibits such a transfer of employees, then to enforce the Orange Book in this setting

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[11] The arbitrators also found that although the proposed consolidation of freight car repair facilities "was not expressly and specifically presented to the Commission during administrative proceedings culminating in approval of the control application," the transaction was nevertheless an "action taken pursuant to authorizations of th[e] Commission," within the meaning of *New York Dock*. 89-1028 Pet. App. 78a.

would "serve[ ] as an impediment to implementation of a transaction authorized by the Commission." *Id.* at 44a. The Commission also found that, in light of the positions available at Raceland and the number of Waycross employees eligible for those positions, "[i]mposition of an Orange Book employee exception would effectively prevent implementation of the proposed transaction." *Id.* at 45a.[12] The Commission accordingly reversed the arbitrators' decision "to the extent it holds that CSX may not require transfer of [Seaboard] employees as well as work from Waycross to Raceland." *Id.* at 44a.[13]

3. *The Court of Appeals' Decision*

The court of appeals considered the two cases together and reversed and remanded. Pet. App. 1a-26a. The court held that Section 11341(a) of the Act does not authorize the Commission to relieve a party to a Section 11343 transaction of contractual obligations that impede implementation of the transaction.[14] The court explained that the

[12] In particular, the Commission noted that CSX "propose[d] to establish a total of 107 positions at Raceland, including 86 carmen positions. Of the 86 Waycross carmen who are eligible for those positions, 57 are entitled to Orange Book protection." If the arbitrators' decision prevailed, the Commission observed, "those 57 Waycross employees (over 55 percent of the proposed Raceland work force) [could] refuse to accept positions at Raceland." 89-1028 Pet. App. 44a-45a.

[13] Commissioner Lamboley dissented. 89-1028 Pet. App. 46a-52a. He expressed "substantial doubt" that the proposed transfer of work and employees was a transaction authorized by the Commission's prior approval of the control by CSX of Chessie and Seaboard. *Id.* at 46a. He also rejected the proposition that "*any* conflict, regardless of origin or degree, is an impediment pre-empted by [Interstate Commerce Act] provisions." *Id.* at 49a.

[14] The court of appeals acknowledged that the rule of deference articulated in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), "applies to the ICC's reading of the statute that it is charged with implementing." Pet. App. 11a. The court stated, however, that deference may be afforded only where a court determines, "based upon the language of the statute and the 'traditional tools of statutory construction,' * * * that Congress has not 'directly spoken to the precise question at issue.' " *Ibid.*

statute does not expressly state that the ICC may override contracts, "nor has it ever, in any of the various iterations since its initial enactment in 1920, included even a general reference to 'contracts,' much less any specific reference to [collective bargaining agreements]." Pet. App. 12a. The court stated that the Commission's contrary view found "no support in the language of the statute," explaining that the phrase "all other law" in Section 11341(a) cannot be read to include "all legal obstacles." Pet. App. 12a.

The court also found no evidence in the legislative history to support the Commission's construction of Section 11341(a). Pet. App. 13a-19a. Looking solely to the Transportation Act of 1920, ch. 91, § 407, 41 Stat. 482, the court stated that Congress had "focused nearly exclusively * * * on specific types of laws it intended to eliminate—all of which were positive enactments, not common law rules of liability, as on a contract." Pet. App. 18a. The court also discerned in the legislative history "a healthy respect for privately negotiated contracts." *Ibid.* "And never, on the several occasions when Congress has revisited the immunity provision, has it either broadened that provision so as to reach 'all legal obstacles' to an ICC-approved transaction, or acted more specifically to bring 'contracts' or 'collective bargaining agreements' within the reach of the statute." *Id.* at 18a-19a.

The court next "decline[d] to address the question" (Pet. App. 19a) whether Section 11341(a) may operate to override provisions of the RLA. Observing that the Commission's present position with respect to the RLA "depart[s]

from its earlier precedent" (Pet. App. 23a), the court directed the agency on remand either to "provide an explanation for its new position on that issue, or adhere to its prior position." *Id.* at 25a. The court also explained that, "[i]n light of [its] holding that § 11341(a) does not empower the ICC to override a [collective bargaining agreement], it is unclear what are the consequences, if any, of its rulings that the carriers need not comply with the RLA." *Id.* at 23a. Because of the "uncertainty as to the effects of [the] ruling on the continued vitality of the disputes," the court decided to remand the RLA issue to the Commission "to determine whether there is any live RLA issue remaining." *Id.* at 25a.

Finally, the court "decline[d] to address either the ICC's theory that the labor protective conditions required by § 11347 of the Act are exclusive, or its related assertion * * * that § 4 of the *New York Dock* conditions gives the arbitration committee the 'absolute right' to effectuate the transfer of employees, and to override any contrary provisions of a [collective bargaining agreement]." Pet. App. 25a. In the court's view, the Commission had not raised those claims in its court of appeals' brief. "In any event," the court concluded (*id.* at 26a), it is "best for the ICC, if it has not abandoned its § 11347 and § 4 rationales altogether, to reconsider them in the first instance in light of" this Court's intervening decision in *Pittsburgh & Lake Erie R.R.* v. *Railway Labor Executives' Ass'n*, 109 S. Ct. 2584 (1989).

4. Petitioners filed petitions for rehearing in the court of appeals. The Commission also filed a "limited" petition for rehearing. In it, the agency advised the court of its "intention to reopen these proceedings and to promptly issue a comprehensive decision on remand addressing issues [the agency] believe[s] the court directed [it] to reconsider and those left open for resolution in further proceedings." The

Commission accordingly "requested that the court refrain from ruling on [the agency's] petition for rehearing until [the agency has] issued [its] decision on remand." *CSX Corp.—Control—Chessie Sys., Inc. & Seaboard Coast Line Indus., Inc.*, ICC Finance No. 28905 (Sub-No. 22) (Aug. 31, 1989) [hereafter, ICC Finance No. 28905].

By order served September 20, 1989, the Commission "reopen[ed] the[ ] proceedings so that [it] could address and explain in detail [its] views on the issue specifically remanded; *i.e.*, whether the provisions of 49 U.S.C. 11341(a) operate to override the provisions of the Railway Labor Act (RLA), as well as on the general issues raised in these proceedings, particularly the impact of our approval of a transaction under 49 U.S.C. 11343 *et seq.* and imposition of our standard labor conditions upon the parties' rights and remedies under the RLA and with respect to existing collective bargaining agreements." ICC Finance No. 28905. The Commission added that "[i]n light of the importance of the legal issues involved and [its] intention to conduct a comprehensive examination of [its] authority under 49 U.S.C. 11341, 11343, and 11347, etc., and the labor conditions [it] ha[s] customarily imposed in approving railroad consolidations," the agency was therefore "seeking further comment by the parties to these proceedings as well as any other interested parties." *Ibid.*

On September 29, 1989, the court of appeals denied petitioners' petitions for rehearing (Pet. App. 50a) and issued an order stating that the Commission's petition would be "deferred pending release of the ICC's decision on remand." Pet. App. 53a-54a. Moreover, the court amended its decision to remand only the "records," thus retaining jurisdiction over the case. Briefs by interested parties have now been filed with the Commission, and the agency entertained oral argument on January 4, 1990.

SUMMARY OF ARGUMENT

The Interstate Commerce Act gives the Interstate Commerce Commission broad authority to approve proposed railroad consolidations that the Commission finds, after appropriate proceedings, to be consistent with the public interest. When such a transaction has been approved, the ICA exempts each participating carrier from "all other law, including State and municipal law, as necessary to let that person carry out the transaction." 49 U.S.C. 11341(a). Construing Section 11341(a) in the present case, the Commission determined that petitioners could proceed with their proposed transactions, notwithstanding any conflicting obligations under collective bargaining agreements executed with the private respondents.

The court of appeals reversed, holding that the phrase "all other law" in Section 11341(a) refers only to "positive enactments, not common law rules of liability, as on a contract." Pet. App. 18a. It is that ruling, and only that ruling, that is before the Court at this point, since all other questions remain for consideration by the Commission and any later judicial review.

With respect to that ruling—involving the applicability of Section 11341 to legal obligations under a collective bargaining agreement—the text, history, and purpose of Section 11341(a) confirm the broader construction adopted by the Commission. Since the Commission is the agency charged with the enforcement of the ICA, its reasonable interpretation of the statute should have been upheld.

A. The text is dispositive. Section 11341(a) exempts a covered carrier from "all other law * * * as necessary to let that person carry out the transaction." The exemption from "all other law" is easily sufficient to embrace those laws governing the obligations of parties to contracts in

general, and to collective bargaining agreements in particular. Contracts are creatures of law, and they are rendered enforceable through a regime of state and federal common and statute law. Indeed, this Court in *Schwabacher* v. *United States*, 334 U.S. 182 (1948), recognized that the "law" referred to in Section 11341 includes the law under which contractual obligations are enforced.

The contracts involved in this case—collective bargaining agreements in the railroad industry—are enforceable under the Railway Labor Act, 45 U.S.C. 151 *et seq.*, which "[u]nquestionably * * * is a federal law" within the meaning of Section 11341(a) (*Brotherhood of Locomotive Eng'rs* v. *Chicago & N.W. Ry.*, 314 F.2d 424, 432 (8th Cir.), cert. denied 375 U.S. 819 (1963)). Thus the long-standing and widespread recognition by the lower courts that Section 11341(a) immunizes ICC-approved transactions from the operation of the RLA where necessary to implement the transaction is both correct and dispositive of the question presented here.

B. The legislative history of Section 11341(a), and of the consolidation provisions generally, confirms the meaning of the text. Section 11341(a) derives from a provision contained in the Transportation Act of 1920, which was intended to foster railroad mergers generally, and which therefore broadly exempted carriers from "all other restraints or prohibitions by law." § 407, 41 Stat. 482. What is more, on two occasions—in 1933, and again in 1940—Congress expressly *refused* to narrow the scope of the ICC's consolidation authority by carving out a special exception for obligations arising from labor agreements.

C. The court of appeals' conclusion—according to which collective bargaining agreements are fully enforceable under the RLA, even when they are in conflict with the terms of an ICC-approved consolidation—cannot

be squared with the evident purpose of the consolidation provisions: to foster the merger process while accommodating, to the fullest extent possible, the competing claims of affected employees. If, as the court of appeals supposed, employees may enforce conflicting contractual rights under the RLA, ICC-approved transactions would "be subjected to the risk of non-consummation." Pet. App. 34a. By proposing a change in the existing collective bargaining agreement, the transaction would thereby provoke a "major" dispute under the RLA. See *Consolidated Rail Corp.* v. *Railway Labor Executives' Ass'n*, 109 S. Ct. 2477, 2480 (1989). Where such a dispute is involved, the parties must maintain the status quo while engaging in a lengthy process of negotiation, mediation, and possibly review by a Presidential Emergency Board. *Detroit & Toledo Shore Line R.R.* v. *United Transp. Union*, 396 U.S. 142 (1969). If that process fails to produce an agreement, each side is free to resort to strikes, lock-outs, or other forms of economic self-help calculated to achieve the desired objectives. See 45 U.S.C. 152 Second and Seventh, 155 First, 156, 157, 160; *Burlington Northern R.R.* v. *Brotherhood of Maintenance of Way Employes*, 481 U.S. 429, 444-445 n.10 (1987). And "[s]ince there is no mechanism * * * for insuring that the parties will arrive at agreement, there can be no assurance that the approved transaction will ever be effected." Pet. App. 34a. If applicable, the procedures for modifying collective agreements under the RLA would therefore "threaten to prevent many consolidations." *Brotherhood of Locomotive Eng'rs* v. *Chicago & N.W. Ry.*, 314 F.2d at 431.

D. "An agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985). In light of the text, history, and purpose of Section 11341(a), the Commission's conclusion—that "all other law" includes the law governing the enforcement of collective bargaining agreements—is entitled to deference and should be upheld.

The court of appeals acknowledged those principles (Pet. App. 11a), but declined to defer to the Commission's construction of the statute. Yet even accepting the court's view (as we do not)—that Congress did not directly address the precise question at issue—the court should have asked only whether the Commission's construction of the statute was "a reasonable one." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-845 (1984). In our view, the Commission's judgment is plainly reasonable, and the court of appeals erred in "substitut[ing] its own construction of a statutory provision for a reasonable interpretation * * * of an agency" (*id.* at 844).

ARGUMENT

UNDER 49 U.S.C. 11341(a), A PARTY THAT HAS ENTERED INTO A MERGER APPROVED BY THE COMMISSION IS EXEMPT FROM ANY LEGAL OBLIGATION IMPOSED BY A COLLECTIVE BARGAINING AGREEMENT, TO THE EXTENT SUCH AN EXEMPTION IS NECESSARY TO IMPLEMENT THE MERGER

The broad ruling of the court of appeals—that the exemptions provided by Section 11341(a) do not apply to those laws governing the enforcement of contractual obligations—raises only one important but limited question for review. If this Court determines, as we believe it should, that this broad ruling was in error, the judgment below should be reversed and the case remanded for consideration of any remaining questions, including those

that are now pending before the Commission and that may be raised in subsequent proceedings for judicial review.[15]

In reaching its conclusion, the court of appeals, in our view, attempted to separate the inseparable—holding that contracts are not included among the laws referred to in Section 11341(a), but at the same time "declin[ing] to address" the question whether Section 11341(a) may operate to override provisions of the RLA. Pet. App. 19a. Contracts derive their effectiveness and enforceability from a regime of state and federal common and statute law, and the collective bargaining agreements at issue here depend for their effectiveness and enforceability on the RLA. Just as this Court held in *Schwabacher* v. *United States*, 334 U.S. 182 (1948), that contractual obligations enforceable under state law are subject to the exemption conferred by Section 11341(a), so the Court should hold in this case that contractual obligations enforceable under the RLA are subject to the same exemption. This result, we submit, is compelled by the text and history of Section 11341(a) and of related provisions.

A. The Text of Section 11341(a) Makes Clear That Participants In An ICC-approved Merger Are Exempt From All Legal Obstacles, Including Obligations Under Collective Bargaining Agreements, That May Jeopardize The Implementation of The Merger

1. As this Court has explained many times, "the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be

[15] These questions may include whether the overriding of contractual obligations was "necessary" to the implementation of the transaction within the meaning of Section 11341(a), and whether and to what extent the Commission's decision was authorized by the labor protective conditions associated with Section 11347.

regarded as conclusive." *Consumer Prod. Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Accord *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987); *Aaron* v. *SEC.*, 446 U.S. 680 (1980); *Greyhound Corp.* v. *Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978). The text of the ICA consolidation provisions, and of Section 11341(a) in particular, leaves no doubt that participants in an ICC-approved merger are exempt from obligations under a collective bargaining agreement that may jeopardize the implementation of the merger.

The statutory language is both clear and straightforward. Section 11344(c) provides that "[t]he Commission shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest." 49 U.S.C. 11344(c). Section 11341(a) provides (49 U.S.C. 11341(a)):

> A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.

As the statutory language indicates, the Commission must determine whether a proposed consolidation is consistent with the public interest. That determination is made on the record, after hearing the views of interested persons. See 49 U.S.C. 11344 (1982 & Supp. V 1987). It is guided by specific statutory criteria (49 U.S.C. 11344(b))—including criteria requiring specific labor protections (49 U.S.C. 11344(b)(1)(D))—and is, of course, subject to judicial review (28 U.S.C. 2342). But once the proposed transaction is approved, Section 11341(a) confers an exemption from "all other law"—an exemption of sufficient breadth

to permit the exempted party to "carry out the transaction," notwithstanding any legal obstacle.

The exemption from "all other law" is easily sufficient to embrace those laws governing the enforceability of contracts in general, and of collective bargaining agreements in particular. Contracts are voluntarily entered into, but depend for their effectiveness and enforcement on a regime of state and federal common and statute law. "The obligation of a contract," this Court has explained, "is the law which binds the parties to perform their agreement." *Hendrickson* v. *Apperson*, 245 U.S. 105, 112 (1917).[16] And the "[l]aws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form part of it, as fully as if they had been expressly referred to or incorporated in its terms"—a principle which "embraces alike those laws which affect its construction and those which affect its enforcement and discharge." *Farmers & Merchants Bank* v. *Federal Reserve Bank*, 262 U.S. 649, 660 (1923).[17]

Those principles apply with special force to collective bargaining agreements. "Federal law * * * create[s] the duty upon the parties to bargain collectively; Congress has provided for a system of federal law applicable to the agreement the parties ma[k]e in response to that duty * * *; and federal law sets some outside limits * * * on what their agreement may provide." *Local 24, Int'l Brotherhood of Teamsters* v. *Oliver*, 358 U.S. 283, 296 (1959). And collective bargaining agreements in the

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[16] Accord *Louisiana* v. *New Orleans*, 102 U.S. 203, 206 (1880); *Walker* v. *Whitehead*, 83 U.S. (16 Wall.) 314, 318 (1873); *Von Hoffman* v. *City of Quincy*, 71 U.S. (4 Wall.) 535, 552 (1867).

[17] Accord *Hendrickson*, 245 U.S. at 112; *Walker*, 83 U.S. (16 Wall.) at 317; *Von Hoffman*, 71 U.S. (4 Wall.) at 550; *Ogden* v. *Saunders*, 25 U.S. (12 Wheat.) 212, 231 (1827).

railroad industry are uniquely "legal" instruments: their formation, construction, and enforcement are regulated by a detailed statutory framework—the Railway Labor Act.

For example, the Railway Labor Act requires the parties to "make and maintain agreements" (45 U.S.C. 152 First) and to refrain from making changes in existing agreements, except according to the procedures established by the Act (45 U.S.C. 152 Seventh, 156). The Act "extends both to disputes concerning the making of collective agreements and to grievances arising under existing agreements." *Slocum* v. *Delaware, L. & W. R.R.*, 339 U.S. 239, 242 (1950). The Act also "sets up machinery for conciliation, mediation, arbitration and adjustment of disputes, to be invoked if negotiations fail." *Ibid.* "[T]he federal statute is the source of the power and authority" of collective bargaining agreements, and "[a] union agreement made pursuant to the Railway Labor Act has, therefore, the imprimatur of the federal law upon it." *Railway Employes' Dep't* v. *Hanson*, 351 U.S. 225, 232 (1956). Accord *California* v. *Taylor*, 353 U.S. 553, 561 (1957).

Thus, the law that renders collective bargaining agreements in the railroad industry binding and enforceable, and that specifies the procedures for changing such agreements, is, in essence, the RLA, an Act that "[u]nquestionably * * * is a federal law" within the meaning of Section 11341(a) (*Brotherhood of Locomotive Eng'rs* v. *Chicago & N.W. Ry.*, 314 F.2d 424, 432 (8th Cir.), cert. denied, 375 U.S. 819 (1963)). As the First Circuit recently noted, Section 11341(a) "extends to any of the statutory provisions regulating railroads, including the RLA." *Brotherhood of Locomotive Eng'rs* v. *Boston & Maine Corp.*, 788 F.2d 794, 800, cert. denied, 479 U.S. 829 (1986). "[T]o hold otherwise would be to disregard the plain language of [the statute] conferring exclusive and

plenary jurisdiction upon the ICC to approve mergers and relieving the carrier from all other restraints of federal law." *Brotherhood of Locomotive Eng'rs* v. *Chicago & N.W. Ry.*, 314 F.2d at 431-432. Accord *Missouri Pac. R.R.* v. *United Transp. Union*, 782 F.2d 107, 111-112 (8th Cir. 1986), cert. denied, 482 U.S. 927 (1987); *Bundy* v. *Penn Cent. Co.*, 455 F.2d 277, 279 (6th Cir. 1972); *Nemitz* v. *Norfolk & W. Ry.*, 436 F.2d 841, 845 (6th Cir.), aff'd without reaching the issue, 404 U.S. 37 (1971).[18]

In short, a contractual provision has legal force only by virtue of law—in this case, the RLA. And the RLA, like any other law, is within the scope of Section 11341(a).

2. The court of appeals attempted to read Section 11341(a) more narrowly. "[D]eclin[ing] to address" the question whether Section 11341(a) applies to the RLA (Pet. App. 19a), the court sought to abstract collective agreements from their federal statutory context, and proceeded to exclude contracts generally from the scope of the Section. In the court's view, "all other law" refers only to "positive enactments, not common law rules of liability" (Pet. App. 18a). As a general proposition, that is surely mistaken; "law" is conventionally understood to include

[18] See also *Texas & N. O. R.R.* v. *Brotherhood of R.R. Trainmen*, 307 F.2d 151, 158-162 (5th Cir. 1962) (holding that the predecessor to Section 11341(a) does not preempt the Norris-LaGuardia Act, 29 U.S.C. 101 *et seq.*, or a prior collective bargaining agreement, but recognizing that under the predecessor provision the Commission has jurisdiction "to find whether certain of the union [contractual] demands are contrary to the public interest in the effectuation of the transaction" and "thereafter to prevent the enforcement" of those demands), cert. denied, 371 U.S. 952 (1963). Cf. *Burlington Northern, Inc.* v. *American Ry. Supervisors Ass'n*, 503 F.2d 58, 62-63 (7th Cir. 1974) (labor-protective conditions imposed as part of ICC approval of a consolidation override conflicting provisions of the RLA), cert. denied, 421 U.S. 975 (1975).

common law, as well as statutes. See *Erie R.R.* v. *Tompkins*, 304 U.S. 64, 79 (1938). Relying on scattered portions of legislative history, however, the court below concluded that Congress had "focused nearly exclusively" on "specific types of laws it intended to eliminate"—all of which were statutes, not common law. Pet. App. 18a. As we have already shown, that inference could not sustain the result reached below, since the "law" in point here *is* a federal statute (the RLA). And as we show below, the court of appeals misread the legislative history. But in any event, as this Court has recently explained, "[i]t is not the law that a statute can have no effects which are not explicitly mentioned in its legislative history." *Pittston Coal Group* v. *Sebben*, 109 S. Ct. 414, 420-421 (1988). See also *Regan* v. *Wald*, 468 U.S. 222, 236-237 (1984); *Volkswagenwerk Aktiengesellschaft* v. *Federal Maritime Comm'n*, 390 U.S. 261, 275 (1968). Like the statute at issue in *Pittston Coal*, Section 11341(a), with its reference to "all other law," "plainly embraces criteria of more general application." 109 S. Ct at 421. Cf. *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 79 (1944) (broad language of predecessor of Section 11341(a) does "not admit of nullification by reference to the varying conditions under which different types of carriers were brought within the statute's operation").

The court of appeals also surmised that to accept the Commission's construction of Section 11341(a) "would lead to most bizarre results." Pet. App. 13a. In particular, the court stated, "[u]nder the ICC's reading, it could set to naught, in order to facilitate a merger, a carrier's solemn undertaking, in a bond indenture or a bank loan, to refrain from entering into any such transaction without the consent of its creditors." *Ibid.* But there is nothing "bizarre" about the Commission's reading of the statute. Indeed, that is precisely the reading this Court gave the

Act in *Schwabacher* v. *United States*, 334 U.S. 182 (1948). In that case, the ICC had approved a merger of two railroad companies, over the objection of certain preferred stockholders of one of the companies. Those stockholders claimed that the terms of the merger deprived them of the full measure of their rights to compensation under the corporate charter—rights that were theirs as owners of the preferred stock and that were recognized under state law. In reaching its determination, the Commission disclaimed jurisdiction to resolve the shareholders' complaint, ruling that after the merger was finally approved the dissenting claimants could file an action in state court to assert their rights as stockholders. This Court rejected the Commission's approach. Relying on the consolidation provisions of the ICA (41 Stat. 482)—including Section 5(11) (Transportation Act of 1940, ch. 722, § 7, 54 Stat. 905, 908-909), the immediate precursor of Section 11341(a) (see p. 35, *infra*)—the Court held that the Commission "was given complete control of the capital structure to result from a merger." 334 U.S. at 195. Accordingly, the Court explained, before approving the merger the Commission was required to consider the claims of the minority shareholders. *Id.* at 197-198. But once the Commission had done so, and had approved the final transaction as "just and reasonable" (*id.* at 194), the dissenting shareholders were not entitled to attack that decision collaterally, regardless of their rights under state law as owners of the shares. *Id.* at 201.[19]

[19] There is, of course, no question that the state law rights of the dissenting shareholders—rights superseded by Section 11341(a)—were contractual in nature, since they arose out of the corporate charter and the terms under which the preferred stock was offered for sale.

In *Texas & N.O. R.R.* v. *Brotherhood of R.R. Trainmen, supra*, the Fifth Circuit, relying on *Schwabacher*, recognized the Commission's jurisdiction to "prevent the enforcement" of union contractual

B. The Legislative History Of Section 11341(a) Confirms That ICC-approved Mergers Are Exempt From All Legal Obstacles, Including Collective Bargaining Agreements, That May Jeopardize The Implementation Of The Merger

The legislative history of Section 11341(a), and of the consolidation provisions generally, confirms the meaning of the text: once approved by the ICC after a plenary public interest proceeding, a merger is immunized from all legal obstacles—including those posed by obligations under collective bargaining agreements—that threaten the implementation of the approved transaction. Indeed, Congress on two occasions—in 1933, and again in 1940—expressly *refused* to narrow the scope of the ICC's consolidation authority by carving out a special exception for obligations arising from labor agreements.

1. *The Transportation Act of 1920*

The language of the present Section 11341(a) finds its origin in the Transportation Act of 1920, ch. 91, 41 Stat. 456. See generally *St. Joe Paper Co.* v. *Atlantic Coast Line R.R.*, 347 U.S. 298, 315-321 (1954) (appendix to opinion of the Court). Sections 407 and 408 of the 1920 Act, 41 Stat. 480, 482, amended Section 5 of the Interstate Commerce Act of 1887, ch. 104, 24 Stat. 380, specifically to encourage railroad consolidation. See *St. Joe Paper Co.* v. *Atlantic Coast Line R.R.*, 347 U.S. at 315-316. Following a period of governmental ownership during World War I, "many of the railroads were in very weak condition and their continued survival was in jeopardy." *Id.* at 315. The 1920 Act therefore directed the Commission, "as soon as practicable," to "prepare and adopt a plan for the consolidation of the railway properties of the continental

demands found to jeopardize effectuation of an approved transaction. 307 F.2d at 161-162.

United States into a limited number of systems." § 407, 41 Stat. 481 (§ 5(4)). "As a result of the enactment of the Transportation Act of 1920, consolidation of the railroads of the country, in the interest of economy and efficiency, became an established national policy * * * so intimately related to the maintenance of an adequate and efficient rail transportation system that the 'public interest' in the one cannot be dissociated from that in the other." *United States* v. *Lowden*, 308 U.S. 225, 232 (1939).

To facilitate the consolidation process, the 1920 Act added Section 5(8), exempting participants in Commission-approved consolidations from federal and state legal obstacles. 41 Stat. 482. Section 5(8) stated (41 Stat. 482 (emphasis added)):

> The carriers affected by any order made under the foregoing provisions of this section * * * shall be, and they are hereby, relieved from the operation of the "antitrust laws," * * * *and of all other restraints or prohibitions by law*, State or Federal, in so far as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section.

Consistent with the overall purpose to effectuate consolidation, this broad statutory language targeted all legal "restraints or prohibitions" that might otherwise impede the covered carrier from accomplishing "anything authorized" by the Commission pursuant to the consolidation provisions.

2. *The Emergency Railroad Transportation Act of 1933*

In the years following the enactment of the 1920 Act, there was a continuing decline in railway revenues and traffic. L. Lecht, *Experience Under Railway Labor Legislation* 105 (1955). Many railroads went bankrupt,

while others borrowed large sums of money from the Reconstruction Finance Corporation to fund continuing operations. S. Rep. No. 87, 73d Cong., 1st Sess. 1 (1933). To meet the resulting interest charges, many railroads deferred maintenance. H.R. Rep. No. 193, 73d Cong., 1st Sess. 9 (1933). Railroad employment dropped from 1,750,000 to 1,000,000. *Ibid.* Responding to the crisis, Congress enacted the Emergency Railroad Transportation Act of 1933 (ERTA), ch. 91, 48 Stat. 211.

Title I of ERTA was temporary legislation—ultimately of three years duration [20]—that was intended to help the railroads become financially stable. See S. Rep. No. 87, *supra*, at 1. It established "emergency powers to be exercised through a railroad coordinator," whose task was "to compel the elimination of unnecessary expenses and the duplication of services and other economy measures" in order "to stabilize the value of railroad securities and make unnecessary a continued drain on Reconstruction Finance Corporation funds." *Id.* at 1-2. The coordinator did not, however, have explicit authority to compel consolidations. See 77 Cong. Rec. 4859 (1933) (Rep. Rayburn) ("The coordinator has nothing whatever to do with consolidations. * * * [T]he question of consolidation * * * is left where it has been since 1920, with the Interstate Commerce Commission and not with any coordinator"). See also *St. Joe Paper Co* v. *Atlantic Coast Line R.R.*, 347 U.S. 298, 317 (1954).

Section 10(a) of Title I of ERTA (48 Stat. 215) contained an immunity provision with language that generally paralleled Section 5(8) of the Transportation Act of 1920

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[20] Originally enacted for one year, Title I was extended for an additional year by Presidential proclamation, Proclamation No. 2081, 48 Stat. 1740 (1934), and then for a third year, until June 17, 1936, by Congress. S.J. Res. 112, 74th Cong., 1st Sess.; 79 Cong. Rec. 9346 (1935).

(41 Stat. 482), the earliest precursor of Section 11341(a). Significantly, however, in response to concerns raised by labor representatives, Congress added an explicit exception from Section 10(a) for the requirements of the RLA and for duties and obligations under collective bargaining agreements entered into pursuant to that Act. Section 10(a) therefore provided in pertinent part (48 Stat. 215):

> The carriers or subsidiaries subject to the Interstate Commerce Act, as amended, affected by any order of the Coordinator or Commission made pursuant to this title shall, so long as such order is in effect, be, and they are hereby, relieved from the operation of the antitrust laws, * * * and of all other restraints or prohibitions by law, State or Federal, other than such as are for the protection of the public health or safety, in so far as may be necesssary to enable them to do anything authorized or required by such order made pursuant to this title: *Provided, however*, That nothing herein shall be construed to repeal, amend, suspend, or modify any of the requirements of the Railway Labor Act or the duties and obligations imposed thereunder or through contracts entered into in accordance with the provisions of said Act.[21]

At the same time, in Title II of ERTA—which, unlike Title I, was *permanent* legislation, see S. Rep. No. 87,

[21] Title I also contained an additional labor protection, ensuring that, allowing for normal attrition, no action taken by the Coordinator could reduce the number of railroad employees below the number in service during May 1933, and providing further that no employee then in service shall "be deprived of employment such as he had during said month of May or be in a worse position with respect to his compensation for such employment, by reason of any action taken pursuant to the authority conferred by this title." § 7(b), 48 Stat. 214.

supra, at 1—Congress amended the consolidation provisions of the Interstate Commerce Act, principally to "give the Commission control over holding companies that acquire stocks of railroads, and thereby effect consolidations without approval of the commission." *Ibid.* In Section 202(15) of Title II, Congress reenacted the immunity provision—Section 5(8) of the 1920 Act—adding somewhat broader language in the process. See 48 Stat. 219. Congress did *not*, however, carve out an exception for the Railway Labor Act or for obligations under agreements made pursuant to that statute. Section 202(15) provided in pertinent part (48 Stat. 219):

> The carriers and any corporations affected by any order made under the foregoing provisions of this section shall be, and they are hereby, relieved from the operation of the antitrust laws * * * and of all other restraints or prohibitions by or imposed under authority of law, State or Federal, insofar as may be necessary to enable them to do anything authorized or required by such order.

The striking difference between Title I of ERTA (temporary legislation, containing an explicit exception for collective bargaining agreements) and Title II of the statute (a precursor of Section 11341(a), containing no exception for collective bargaining agreements) cannot be considered accidental. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983).[22] Indeed, this Court made that very point in con-

[22] Accord *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 432 (1987). See also *Kissinger* v. *Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 148-149 (1980); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 19-20 (1979).

nection with a related provision of ERTA. In *Texas* v. *United States*, 292 U.S. 522 (1934), the ICC had approved a control transaction, over a State's objection that the terms of the transaction would improperly permit the parties to relinquish certain offices within the State. In this Court, the State contended that the transaction violated Section 11 of Title I of ERTA, which withheld from carriers the authority to abandon offices and shops. 48 Stat. 215. The Court rejected that contention. Section 11, the Court explained, was contained in Title I, which dealt only with the " 'emergency powers' * * * of the Federal Coordinator of Transportation and kindred matters." 292 U.S. at 533. As such, the Court added, Section 11 did "not by its terms apply to the provisions of Title II of the Act, in which are found the amendments of § 5 of the Interstate Commerce Act with respect to the approval and authorization by the Interstate Commerce Commission of consolidations, purchases and leases." 292 U.S. at 533. "The insertion of the provision in Title I, * * * and the omission of a similar provision from Title II, indicate an intentional distinction." *Id.* at 534.

So, too, with respect to the exception for collective bargaining agreements: in structuring Titles I and II as it did, Congress "demonstrated that it knew how to provide [for an exception for collective bargaining agreements] when it wished to do so elsewhere in the very 'legislation cited.' " *Lehman* v. *Nakshian*, 453 U.S. 156, 162 (1981). "Under traditional principles of statutory construction," the difference between the two sections must therefore be seen as intentional. *Fedorenko* v. *United States*, 449 U.S. 490, 512 (1981). See *Lawrence County* v. *Lead-Deadwood School Dist. No. 40-1*, 469 U.S. 256, 267 (1985); *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982).

3. *The Transportation Act of 1940*

Section 7 of the Transportation Act of 1940, ch. 722, 54 Stat. 905, amended and recodified Section 5 of the ICA but left the provisions relevant here substantially intact. In particular, Section 5(8) of the 1920 Act, as amended, was subsumed within revised Section 5(11) (54 Stat. 908-909), and remained essentially unchanged. Section 5(11) provided in pertinent part (54 Stat. 908-909):

> any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission * * *.

When Congress recodified this language in the present Section 11341(a) of the ICA, it effected no substantive change. Act of Oct. 17, 1978, Pub. L. No. 95-473, § 3(a), 92 Stat. 1466; *Trailer Marine Transp. Corp* v. *FMC*, 602 F.2d 379, 383 n.18 (D.C. Cir. 1979). See H.R. Rep. No. 1395, 95th Cong., 2d Sess. 158-160 (1978). See also *ICC* v. *Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 299 n.12 (1987) (Stevens, J., concurring in the judgment).

During the legislative process culminating in the 1940 Act, there was "a widespread awareness in the railroad industry that many of the economies to be gained from consolidations or abandonments could be realized only at the expense of displaced railroad labor." *Railway Labor Executives' Ass'n* v. *United States*, 339 U.S. 142, 147 (1950). Reflecting that concern, Congress enacted, in Section

5(2)(f) of the Act, 54 Stat. 906-907, a labor protective provision for employees affected by ICC-approved consolidations.[23]

Prior to the enactment of Section 5(2)(f), however, Representative Harrington offered an amendment to the provision, designed to protect affected employees against any displacement or other interference with contractual rights:

> *Provided, however*, That no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees

[23] Section 5(2)(f) provided as follows (54 Stat. 906-907):

> As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provision of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

Transportation Act of 1940, ch. 722, § 7, 54 Stat. 906-907 (§ 5(2)(f)). The current version of this provision is 49 U.S.C. 11347 (Supp. V 1987). See p. 40, *infra*.

> of the carrier or carriers, or in the impairment of existing employment rights of said employees.

84 Cong. Rec. 9882 (1939). The proposed amendment posed a significant obstacle to the prospects of future consolidations. As this Court observed in *Railway Labor Executives' Ass'n* v. *United States*, 339 U.S. at 151, until the Harrington Amendment was offered, "there had been substantial agreement on the need for consolidations, together with a recognition that employees could and should be fairly and equitably protected. This amendment, however, threatened to prevent all consolidations to which it related."

Not surprisingly, therefore, the Harrington Amendment encountered intense opposition. In a January 29, 1940 letter to the Chairman of the Senate and House Committees on Interstate Commerce, the Interstate Commerce Commission stated:

> As for the [Harrington Amendment], the object of unifications is to save expense, usually by the saving of labor. * * * The proviso, by prohibiting any displacement of employees, goes much too far, and in the long run will do more harm than good to the employees. In these days of intense competition from other forms of transportation, the railroads must, if they are to thrive and grow, conduct their operations with the utmost possible economy and efficiency. If they are prevented from doing this, further shrinkage of operations and continuing loss of employment are inevitable.

Staff of House Legislative Comm. On Interstate Commerce Commission, 76th Cong., 3d Sess., *Omnibus Transportation Legislation* 67 (House Comm. Print 1940). After a lengthy conference, on April 26, 1940, the conferees agreed on a bill that followed the form of the House

Amendment but did not contain the Harrington Amendment. See H.R. Conf. Rep. No. 2016, 76th Cong., 3d Sess. 16 (1940); 86 Cong. Rec. 5879-5880 (1940). The House voted to recommit the bill with instructions to its conferees to insist on a modified version of the Harrington Amendment. 86 Cong. Rec. 5886 (1940). After further consideration, the conferees then reported out the bill a second time without the Harrington Amendment. That bill became the Transportation Act of 1940.[24]

The defeat of the Harrington Amendment confirms Congress's intent to allow carriers to implement ICC-approved consolidations—notwithstanding the "impairment of existing employment rights of * * * employees"—as long as those employees are compensated and otherwise fairly protected under the Commission's labor protective conditions. Accord *Brotherhood of Maintenance of Way Employes* v. *United States*, 366 U.S. 169 (1961). The court of appeals' decision in the present case overlooks the point, construing Section 11341(a) as if the Harrington Amendment had become law and indeed had been rewritten to extend to all contractual obligations. But the amendment was rejected; and "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 442-443 (1987). See generally *Fox* v. *Standard Oil Co.*, 294 U.S. 87, 96 (1935).

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[24] The bill was passed by the House on August 12, 1940, 86 Cong. Rec. 10,194, and by the Senate on September 9, 1940, 86 Cong. Rec. 11,766. It was signed by the President on September 18, 1940, 86 Cong. Rec. 12,290.

C. The Court of Appeals' Decision Cannot Be Squared With The Purpose Of The ICA Consolidation Provisions

The scope of Section 11341(a) must also be "measured by the purpose which Congress had in view"—in this case, "the promotion of economy and efficiency in interstate transportation by the removal of the burdens of excessive expenditure" (*Texas* v. *United States*, 292 U.S. 522, 534-535 (1934)). The court of appeals' conclusion—according to which collective bargaining agreements are fully enforceable even when they are in conflict with the terms of an ICC-approved consolidation—cannot be squared with that evident purpose.

The consolidation provisions foster the merger process, while at the same time accommodating, to the fullest extent possible, the competing claims of employees and other persons who may be adversely affected by the proposed transaction. The statute accomplishes that goal by providing interested parties—including labor unions—extensive opportunities to participate in the Commission's consolidation review proceedings and to voice their objections during the "public interest" inquiry. Parties may object, in whole or in part, to approval of a transaction, on the ground that such approval will undermine the policies expressed in other federal statutes. The Commission must take account of these objections, in determining whether the merger is "consistent with the public interest." 49 U.S.C. 11344(c). See, *e.g.*, *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 79-80 (1944) (antitrust objections to motor carrier consolidation).

The consolidation provisions are particularly solicitous of employees who may be adversely affected by a transaction. Recognizing that consolidations necessarily "result in wholesale dismissals and extensive transfers, involving expense to transferred employees," as well as "the loss of seniority rights" (*United States* v. *Lowden*, 308 U.S. 225,

233 (1939)), the statute imposes a variety of labor protective requirements. Before it may give its approval, the Commission must consider "the interest of carrier employees affected by the proposed transaction." 49 U.S.C. 11344(b)(1)(D). Moreover, as part of any approved transaction, the Commission must impose certain "employee protective arrangements," including a guarantee generally ensuring that "the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission." 49 U.S.C. 11347 (Supp V 1987). And pursuant to Section 11347, the Commission has traditionally imposed the so-called *New York Dock* conditions, which generally entitle an affected employee to receive, for a period of years, the equivalent of the wages he received prior to displacement. See *New York Dock Ry.—Control—Brooklyn Eastern Dist. Terminal*, 360 I.C.C. 60, 84-90, aff'd *sub nom. New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979).

In this manner, the consolidation provisions ensure that all affected parties have a voice in the approval process, and are accommodated as fully as possible in the approved transaction. At the same time, Section 11341(a) ensures that once the approval has been granted, an exemption from "all other law" takes immediate effect. The statute does not permit employees, who have already received the protections afforded by Section 11347, to impede implementation of the merger by insisting on conflicting collective bargaining rights under the RLA.

Were resort to the RLA necessary, approved transactions would "be subjected to the risk of non-consummation" (Pet. App. 34a). By proposing a change in the existing collective bargaining agreement, the transaction would thereby provoke a "major" dispute under the

RLA. See *Consolidated Rail Corp.* v. *Railway Labor Executives' Ass'n*, 109 S. Ct. 2477, 2480 (1989); *Elgin, J. & E. Ry* v. *Burley*, 325 U.S. 711, 723 (1945), aff'd on reh'g, 327 U.S. 661 (1946). In any such dispute, the parties must maintain the status quo while engaging in a lengthy process of negotiation, mediation, and possibly review by a Presidential Emergency Board. *Detroit & Toledo Shore Line R.R.* v. *United Transp. Union*, 396 U.S. 142 (1969). If that process fails to produce an agreement, each side is free to resort to strikes, lock-outs, or other forms of economic self-help calculated to achieve the desired objectives. See 45 U.S.C. 152 Second and Seventh, 155 First, 156, 157, 160; *Burlington Northern R.R.* v. *Brotherhood of Maintenance of Way Employes*, 481 U.S. 429, 444-445 n.10 (1987); *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969).

Although that "virtually endless" process may well be suited to prevent the kind of "labor unrest" that gave rise to the RLA (*Burlington Northern R.R.* v. *Brotherhood of Maintenance of Way Employes*, 481 U.S. at 444), it poses severe difficulties for approved consolidations. "[U]nder the Railway Labor Act provisions, it is possible for either party to completely block any change in working conditions by refusing to agree to a change and by refusing to arbitrate." *Brotherhood of Locomotive Eng'rs* v. *Chicago & N.W. Ry.*, 314 F.2d at 431. As the Commission has noted, "[s]ince there is no mechanism * * * for insuring that the parties will arrive at agreement, there can be no assurance that the approved transaction will ever be effected." Pet. App. 34a. If applicable, the RLA would therefore "threaten to prevent many consolidations." *Brotherhood of Locomotive Eng'rs* v. *Chicago & N.W. Ry.*, 314 F.2d at 431. Such an outcome cannot be squared with the evident purpose of the consolidation provisions, and Section 11341(a) in particular: to provide an exemp-

tion "as necessary to let [the participant] carry out the transaction" (49 U.S.C. 11341(a)).

D. The Court Of Appeals Erroneously Declined To Defer To The Commission's Construction Of Section 11341(a)

This Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). "An agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985). In light of the text, history, and purpose of Section 11341(a), the Commission's conclusion—that the Section applies to legal obligations under collective bargaining agreements—is entitled to deference and should be upheld.

The court of appeals acknowledged those principles (Pet. App. 11a), but declined to defer to the Commission's construction of the statute. The court observed that deference is appropriate only when a court determines, "based upon the language of the statute and the 'traditional tools of statutory construction,' * * * that Congress has not 'directly spoken to the precise question at issue' " (*ibid.*). The court therefore elected to "strike out * * * in search of Congress's intent in enacting the immunity provision of the Act." *Id.* at 11a-12a.

The results of the court's "search" did not justify the panel's refusal to defer to the Commission. After canvassing the text and history of the statute, all the court could determine—on its view of the case—was (1) that Section 11341(a) does not *expressly* refer to "contracts" (Pet. App. 12a); (2) that Section 11341(a) was intended *principally* to

protect against "unfriendly state commissions and legislatures" (Pet. App. 15a) and "recently invigorated antitrust laws of the federal Government" (*id.* at 16a); (3) that in enacting Section 11341(a) Congress had "focused nearly exclusively" on "positive enactments, not common law rules of liability" (Pet. App. 18a); and (4) that in the legislative debates on the 1920 Act, Congress had "exhibited a healthy respect for privately negotiated contracts" (*ibid.*).

Even under the court of appeals' view (which we vigorously dispute), that evidence does not justify a refusal to defer to the Commission. Assuming that Congress did not directly address the precise question at issue, the question before the court was whether the Commission's construction of the statute "in the context of this particular program is a reasonable one." *Chevron U.S.A. Inc.*, 467 U.S. at 843-845. Here, the Commission's judgment is plainly reasonable. Thus, even were the case a close one on the merits—and we do not think it is—the court of appeals erred in "substitut[ing] its own construction of a statutory provision for a reasonable interpretation * * * of an agency" (*Chevron U.S.A. Inc.* 467 U.S. at 844).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.

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